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Supreme Court, U.S.
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No. 00-795

IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, *et al.*,

Petitioners,

v.

THE FREE SPEECH COALITION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief Of Association Of American Publishers, Inc., American Booksellers Foundation For Free Expression, Freedom To Read Foundation, International Periodical Distributors Association, Magazine Publishers Of America, Publishers Marketing Association, And Video Software Dealers Association As *Amici Curiae* In Support of Respondents

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TABLE OF CONTENTS

Page

Table of Cited Authorities iii

Introduction and Interest of the *Amici* 1

Summary of Argument 4

Argument 6

I. The CPPA Is An Unconstitutional Ban On Protected Speech 6

A. The Court of Appeals Properly Applied Strict Scrutiny 6

B. The CPPA Does Not Serve a Compelling Government Interest 7

1. The CPPA exceeds the limits this Court has placed on the definition of child pornography 7

2. The government has no compelling interest in banning imaginative works on the ground that they may have harmful effects 12

3. Facilitating enforcement of existing child pornography laws is not a compelling government interest .. 17

Contents

	Page
C. If Upheld, the CPPA Could Lead to More Governmental Regulation of Protected Speech on the Basis of Its Perceived Harmful Effects	18
II. The CPPA Is Overbroad	21
III. The CPPA Is Impermissibly Vague	25
IV. The CPPA's Affirmative Defense Does Not Render It Constitutional	28
Conclusion	30
Appendix A — The *Amici*	1a

TABLE OF CITED AUTHORITIES

	Page
Federal Cases:	
American Amusement Machine Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001)	19
American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986)	14, 16
Baggett v. Bullitt, 377 U.S. 360 (1964)	26
Brandenburg v. Ohio, 395 U.S. 444 (1969)	15
Camfield v. Oklahoma City, 248 F.3d 1214 (10th Cir. 2001)	23
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	16
Eclipse Enterprises, Inc. v. Gulotta, 134 F.3d 63 (2d Cir. 1997)	19
Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999)	*passim*
Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987)	16, 17
Hess v. Indiana, 414 U.S. 105 (1973)	15
Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York, 360 U.S. 684 (1959)	21

Cited Authorities

Page

Kolender v. Lawson, 461 U.S. 352 (1983) 25, 26

Miller v. California, 413 U.S. 15 (1973) 7

New York v. Ferber, 458 U.S. 747 (1982) ..... *passim*

Oklahoma v. Blockbuster Videos, Inc., No. Civ. 97-1281-T, 1998 WL 1108158, 27 Media L. Rep. 1248 (W.D. Okla. Oct. 20, 1998) 23, 24

Osborne v. Ohio, 495 U.S. 103 (1990) 11, 13

R.A.V. v. St. Paul, 505 U.S. 377 (1992) 6, 15

Regina v. Hicklin, L.R. 3 Q.B. 360 (1868) 15

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) ..... *passim*

Roth v. United States, 354 U.S. 476 (1957) 3, 15

Smith v. California, 361 U.S. 147 (1959) 18, 26

Smith v. Goguen, 415 U.S. 566 (1974) 25

Speiser v. Randall, 357 U.S. 513 (1968) 26

Stanley v. Georgia, 394 U.S. 557 (1969) ..... *passim*

Texas v. Johnson, 491 U.S. 397 (1989) 15

Cited Authorities

Page

United States v. Hilton, 167 F.3d 61 (1st Cir.), *cert. denied*, 528 U.S. 844 (1999) 21

United States v. Knox, 32 F.3d 733 (3d Cir. 1994) 22

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 3, 6, 7, 15

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 28, 29

Video Software Dealers Ass'n v. Oklahoma City, 6 F. Supp. 2d 1292 (W.D. Okla. 1997) 23

Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992) 19

Whitney v. California, 274 U.S. 357 (1927) 21

State Cases:

McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Cal. App. 1988) 16

United States Constitution:

First Amendment ..... *passim*

Federal Statutes:

18 U.S.C. § 2252A(b) 27

18 U.S.C. § 2252A(c) 9, 28

Cited Authorities

	Page
18 U.S.C. § 2256(2)(A)	23
18 U.S.C. § 2256(8)(B)	9
18 U.S.C. § 2256(8)(D)	9
Legislative Materials:	
H.R. 1005, 107th Cong. (2001)	19
H.R. 2036, 106th Cong. (1999)	19
S. 792, 107th Cong. (2001)	19
S. Rep. No. 104-358 (1996)	9, 10, 17
Miscellaneous:	
Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 339 (Summer 1997)	14, 16, 20
Clay Calvert, *The 'Enticing Images' Doctrine: An Emerging Principle in First Amendment Jurisprudence?*, 10 FORDHAM I.P., MEDIA & ENT. L.J. 595 (2000)	14, 18
"Fallout from Child Pornography Act: 'Kiddie porn' Law Has Apparently Scared Off Potential Distributors," San Francisco Chronicle, Aug. 3, 1997	22

INTRODUCTION AND INTEREST OF THE *AMICI*

The Association of American Publishers, Inc., American Booksellers Foundation for Free Expression, Freedom to Read Foundation, International Periodical Distributors Association, Magazine Publishers of America, Publishers Marketing Association, and Video Software Dealers Association (hereinafter, "*amici*") submit this brief *amici curiae* in support of respondents.[1]

Amici and their members publish, produce, distribute, sell, and loan books, magazines, videos, works of art, and printed materials of all types, including works that are scholarly, literary, artistic, scientific, and entertaining.[2] They are essential intermediaries between the creators and the consumers of artistic and literary materials. *Amici* publish, distribute, and sell mainstream materials that may include photographs or depictions of young adults engaged in sexual conduct, the creation of which could be chilled by, or become the subject of prosecution under, the Child Pornography Prevention Act of 1996 ("CPPA" or the "Act"). In addition, *amici* publish, distribute, and sell a wide range of what some may consider provocative, controversial *non-sexual* material that also may be vulnerable to regulation if the CPPA is upheld. *Amici* therefore have a significant interest in the resolution of this case.

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1. Pursuant to Rule 37.6 of the rules of the Court, counsel for the *amici* discloses that counsel for the parties did not take part in authoring this brief in whole or in part, and no persons or entities other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37(3)(a), *amici* have obtained the written consent of the parties to the filing of this brief. Those consents have been lodged with the clerk.

2. A description of the *amici* is attached as Appendix A.

Amici are committed to the principle that defending controversial, distasteful, and even potentially dangerous speech is necessary to vindicate First Amendment protection for the diverse products of the human imagination. This case involves an attempt by the federal government to ban products of the human imagination. Prior to the CPPA, child pornography was defined and generally understood to consist of images created with the participation of children; it was deemed unprotected by the First Amendment in order to prevent the exploitation of these children. *See New York v. Ferber*, 458 U.S. 747 (1982). In *Ferber*, indeed, the Court specifically approved and virtually recommended the use of simulation or young-looking adults in order to avoid the abuse of minors used to create sexually-explicit material. 458 U.S. at 763, 765.

In passing the CPPA, Congress disregarded *Ferber* and expanded the definition of child pornography to include "virtual" child pornography — images generated by computer without the use of minors — and any other images that "appear[] to be" minors engaging in sexual activity. Congress justified this dramatic broadening of the scope of the child pornography law on the ground that images that merely "appear[] to be" minors can have harmful consequences for minors. However, as the court of appeals observed, in criminalizing "[i]mages that are, or can be, entirely the product of the mind," *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1092 (9th Cir. 1999), Congress entered the realm of impermissible content-based censorship and banned a substantial amount of speech that is constitutionally protected because it is not obscene and does not involve the use of actual children.

Amici are as outraged over the sexual exploitation of children as the members of Congress who drafted the CPPA. But antipathy to child pornography and abhorrence of predatory pedophiles must not obscure the significant First Amendment principles implicated in this case. As this Court recently observed, "The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000).

The CPPA exceeds the limitations that the First Amendment places on government efforts to combat social problems by suppressing speech. Once the link to the abuse of actual children used in the creation of the material is broken — as it is with "virtual" child pornography or material that depicts young-looking adults — the remaining asserted state interests involve seeking to control the *effects* or *uses of* images that were otherwise lawfully created. The court of appeals correctly found that these bases for prohibiting speech are antithetical to fundamental First Amendment principles.

The regulation of otherwise protected speech on the ground that it *may stimulate improper thoughts or be used as an instrument of crime in the hands of deviant persons* is a dangerous incursion on the First Amendment, an invitation to censorship, and a return to an approach discarded as unconstitutional by the Court years ago. *See Roth v. United States*, 354 U.S. 476 (1957). Attempting to control evil conduct by banning evil thoughts is fundamentally antithetical to this country's conception of free speech. As this Court recognized in *Stanley v. Georgia*, 394 U.S. 557, 565 (1969), "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Outside a few strictly limited categories,

which are not at issue here, regulating speech based on the impact on the listener or viewer "turn[s] First Amendment jurisprudence on its head." *Free Speech Coalition*, 198 F.3d at 1095.

Amici fear that the broad and subjective language in the CPPA will chill a substantial amount of constitutionally protected expression. The ban on non-obscene depictions of what "appears to be" or is "advertised, promoted, presented, described, or distributed" in a manner that "conveys the impression" of being a minor engaged in sexual conduct gives authorities the power to police a wide-range of artistic, educational, scholarly or entertaining images, and thus will have a chilling effect on the mainstream media that *amici* and their members represent. Any harm that may be inflicted on minors by pedophiles with the assistance of materials that *appear* to depict minors engaged in sexual activity must be combated by punishing pedophiles, not by potentially depriving the public of mainstream works.

In light of these concerns, and for the reasons set forth herein, *amici* urge the Court to affirm the decision of the court of appeals.

SUMMARY OF ARGUMENT

Children are among the most precious and vulnerable members of our society, and the goal of protecting minors from sexual abuse is critically important. That goal must be achieved, however, without trampling upon well-established First Amendment principles.

The CPPA violates the First Amendment in several respects:

1. It is a content-based speech restriction that fails strict scrutiny because it bans speech on the basis of the effect that speech purportedly has on certain particularly susceptible listeners or the use to which it is put by one deviant class, a rationale for censorship that is not countenanced by our First Amendment jurisprudence and that, if upheld, would set a dangerous precedent for regulating heretofore protected speech.

2. It is overbroad, as it can be interpreted to apply to a substantial amount of mainstream, constitutionally protected artistic expression.

3. It is impermissibly vague, as the subjectivity of the terms "appears to be" and "conveys the impression" invest authorities with excessive discretion to prosecute citizens for possession or distribution of a wide-range of otherwise protected expression.

4. Its affirmative defense improperly shifts the burden of disproving an element of a criminal offense to the defendant and fails to cure the Act's constitutional defects.

ARGUMENT

I. THE CPPA IS AN UNCONSTITUTIONAL BAN ON PROTECTED SPEECH

A. The Court of Appeals Properly Applied Strict Scrutiny

The Court of Appeals correctly found that the CPPA is a content-based speech restriction. *See Free Speech Coalition*, 198 F.3d at 1090-91. As such, it is presumptively unconstitutional and may only be upheld if it survives strict scrutiny. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). The CPPA is content-based because the "appears to be" and "conveys the impression" provisions distinguish protected from unprotected speech based on its content — specifically, the impression the content makes on the viewer. *See Playboy*, 529 U.S. at 811-13 (law that "focuses only on the content of the speech and the direct impact that speech has on its listeners . . . is the essence of content-based regulation"); *see also Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997) ("The purpose of the CDA is to protect children from the primary effects of 'indecent' and 'patently offensive' speech. . . . Thus, the CDA is a content-based blanket restriction on speech.").

The government's contention that strict scrutiny does not apply to the CPPA notwithstanding the fact that it is content-based because it prohibits unprotected speech (Pet. Br. at 26) places the cart before the horse.[3] As discussed

3. The government no longer presses the erroneous argument that the CPPA is content-neutral. *See Free Speech Coalition*, 198 F.3d at 1091.

above and further below, *Ferber* held the child pornography at issue there to be unprotected because the government has a compelling interest in preventing the sexual abuse of minors that are used in the creation of such material. The government admits, however, that the "virtual" child pornography at issue here is *not* child pornography as defined in *Ferber*. *See* Pet. Br. at 21. Rather, the CPPA represents an attempt to create an entirely new category of unprotected speech. Accordingly, the government must satisfy strict scrutiny by demonstrating that the CPPA is narrowly tailored to serve a compelling state interest. *See Playboy*, 529 U.S. at 813. As shown below, the CPPA fails strict scrutiny because it does not further a compelling government interest *and* is not narrowly tailored to avoid suppressing protected speech.

B. The CPPA Does Not Serve a Compelling Government Interest

1. The CPPA exceeds the limits this Court has placed on the definition of child pornography

Prior to *Ferber*, the only sexually oriented material that was not protected by the First Amendment was material that was obscene under the three-part test set forth in *Miller v. California*, 413 U.S. 15 (1973). In *Ferber*, the Court held that child pornography is unprotected speech even if it does not qualify as obscenity under the *Miller* test.[4] However, *Ferber* expressly limited the definition of child pornography to material created using actual children. *See Ferber*, 458

4. In rejecting application of the *Miller* standard to child pornography, the Court observed that the *Miller* factors "bear no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work." *Ferber*, 458 U.S. at 761.

U.S. at 764 ("When a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production . . . it is permissible to consider these materials as without the protection of the First Amendment.").

The Court in *Ferber* cited five reasons for its finding that child pornography is not protected speech, all of which concerned the well-documented harm to children used in the production of sexually explicit work. 458 U.S. at 756-64. Making clear that the state's compelling interest did not go beyond protecting children who participated in the creation of the material, the Court stated:

> We note that the distribution of descriptions or other depictions of sexual conduct [involving minors], not otherwise obscene, *which do not involve live performance or photographic or other visual reproduction of live performance*s, retains First Amendment protection.

458 U.S. at 764-65 (emphasis added). Reinforcing the idea that material can qualify as child pornography only if it depicts actual minors, the Court noted:

> [I]f it were necessary for literary or artistic value, *a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative. . . .*

Id. at 763 (emphasis added). Thus, *Ferber* clearly endorsed using adults who appear to be underage as well as using simulations of minors in non-obscene sexually-explicit works.

The CPPA prohibits works of the type expressly approved in *Ferber*. It bans "any visual depiction" that "is, *or appears to be*, of a minor engaging in sexually explicit conduct" or that is "advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. §§ 2256(8)(B), (D) (emphasis added). Thus, the CPPA contravenes *Ferber* by (1) prohibiting the use of young-looking adults who appear to be minors unless the creator or purveyor of the material can demonstrate that it did not intend for the adult to be viewed as a minor; and (2) prohibiting the use of computer-simulated or other realistic-looking depictions of children in sexually explicit films, paintings, drawings, or sculptures with serious literary, artistic, political, or scientific value. *See* 18 U.S.C. § 2252A(c).

Congress's primary avowed purpose in enacting the CPPA was to combat the creation, possession, and dissemination of so-called "virtual" child pornography, *i.e.*, images of minors engaged in sexually explicit conduct that are made through computer imaging techniques and do not involve the use of actual children. *See* S. Rep. No. 104-358, at 7 (1996). Specifically, the CPPA is predicated on findings that simulated child pornography, like real child pornography, "stimulates the sexual appetites" of pedophiles and is used by pedophiles to persuade children to engage in sexual conduct. *See* S. Rep. No. 104-358, at 12-14; Pet. Br. at 4-5. The government contends that it has a compelling interest in banning virtual child pornography because the images affect viewers in a manner that poses a danger to minors and to society. In addition, the government contends that virtual child pornography hinders the prosecution of child pornography defendants by making it impossible for

prosecutors to prove that pornographic materials depict actual children and that it fuels the market for traditional child pornography. *See* S. Rep. No. 104-358, at 16-17; Pet. Br. at 6.

These rationales for banning the production, distribution, possession, and viewing of virtual child pornography do not constitute compelling government interests under *Ferber*. In *Ferber*, as noted, the Court held that the government may constitutionally prohibit the production and distribution of child pornography to prevent physical and psychological harm to the actual children who are its subjects. 458 U.S. at 756-64. In the CPPA, by contrast, Congress targeted speech that, unlike traditional child pornography, is not inherently harmful because of how it is made, but, rather, *is believed to have an undesirable effect on pedophiles*. This attempt to ban speech based on how it may affect certain recipients who then may use it for improper purposes runs afoul of core First Amendment principles. If accepted, it would pave the way for regulation of many kinds of heretofore protected speech that are posited to have an undesirable effect on certain vulnerable readers or listeners, as discussed further below.

The government contends that *Ferber* does not preclude banning computer-generated child pornography because the computer technology used to create such images did not exist when *Ferber* was decided and therefore was not contemplated by the Court in that case. Pet. Br. at 27. This argument has no force in light of the fact that the Court in *Ferber* expressly contemplated the use of alternatives to actual children engaging in sexual conduct, such as youthful-looking adults or simulations, as constitutionally permissible methods of creating non-obscene sexually explicit material.

The fact that computer morphing was not specifically before the Court in *Ferber*, and may not have been perceived as a problem at the time, does not invalidate the Court's view that imagery created without using actual children would not cause the harms that the Court found warranted denying First Amendment protection to child pornography notwithstanding any literary, artistic, political or scientific value that it might possess.

The government also contends that in *Osborne v. Ohio*, 495 U.S. 103 (1990), this Court expanded the permissible bases for regulating child pornography beyond those approved in *Ferber*. Pet. Br. at 31. The government points to the Court's statement in *Osborne* that "encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." *Osborne*, 495 U.S. at 111. The government argues, as did the dissent in the court of appeals, that this rationale applies equally to "virtual" child pornography. *See* Pet. Br. at 31; *Free Speech Coalition*, 198 F.3d at 1099 (Ferguson, J., dissenting). As the court of appeals pointed out, however, *Osborne*, like *Ferber*, was concerned with halting "the use of children as subjects of pornographic materials." 495 U.S. at 109; *Free Speech Coalition*, 198 F.3d at 1094 n.7. Just as "[n]othing in *Ferber* can be said to justify the regulation of [child pornography] other than the protection of the actual children used in the production of the materials," *Free Speech Coalition*, 198 F.3d at 1092, nothing in *Osborne* suggests that the Court would have found that preventing pedophiles from using material not created using actual minors would rise to the level of a compelling state interest.

2. The government has no compelling interest in banning imaginative works on the ground that they may have harmful effects

The court of appeals understood that in seeking to ban creative images that look like real child pornography, Congress overstepped the bounds of the First Amendment.

> Because the [CPPA] attempts to criminalize disavowed impulses of the mind, manifested in illicit creative acts, we determine that censorship through the enactment of criminal laws intended to control an evil idea cannot satisfy the constitutional requirements of the First Amendment . . . . To accept the secondary effects argument as the gauge against which the statute must be measured requires a remarkable shift in the First Amendment paradigm. Such a transformation, how speech impacts the listener or reviewer, would turn First Amendment jurisprudence on its head.

Free Speech Coalition, 198 F.3d at 1094-95. The First Amendment paradigm to which the court of appeals alluded is that speech cannot be regulated in order to eradicate thoughts or ideas, however offensive or repugnant they may be, except in the extremely limited circumstances discussed below. Thus, "any victimization of children that may arise from pedophiles' sexual responses to pornography apparently depicting children engaging in explicit sexual activity is not a sufficiently compelling justification for CPPA's speech restrictions" because "to hold otherwise enables the criminalization of foul fragments of creative technology that do not involve any human victim in their creation or in their presentation." *Id.* at 1093.

Because the compelling state interest identified in *Ferber* and *Osborne* in prohibiting even the possession of speech that is *inherently* harmful to the children exploited in its creation is absent in this case, the concerns raised by the Court in *Stanley* regarding the regulation of evil thoughts are equally valid here. In *Stanley*, where the Court struck down a statute that prohibited the private possession of obscene material, the Court stated: "Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts." 394 U.S. at 565. That objective, the Court held, "is wholly inconsistent with the philosophy of the First Amendment." *Id.* at 566. The fact that the CPPA was designed to combat not just the possession of child pornography but also the activities of child molesters and pedophiles does not lessen the concern that Congress has criminalized artistic creations based on the fear of how a certain class of susceptible viewers will react to them. This is tantamount to the government attempting to "control the moral content of a person's thoughts." *Id.* at 565.

The legitimacy of Congress's goals in passing the CPPA does not validate the means Congress has chosen to pursue those goals. Congress has banned a form of speech that is in itself purely the product of a person's mind in order to forestall repugnant thoughts that may be acted upon. The Court addressed an analogous rationale in *Stanley*, where it held that

> the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit

> possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.

394 U.S. at 567.

The court of appeals correctly held that the government's interest in engaging in such thought control is not compelling. *See Free Speech Coalition*, 198 F.3d at 1094-95; *id.* at 1092 ("the articulated compelling state interest cannot justify the criminal prescription when no actual children are involved in the illicit images either by production or depiction"). *See also* Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 339, 460 (Summer 1997) ("Virtual child pornography, which is not obscene, is nothing more than an imaginative idea. However repulsive, however disgusting to majoritarian beliefs, ideas constitute protected speech."). Banning otherwise protected speech based on its putative effects is anathema to the First Amendment because it "has the potential to mask the regulation of speech simply because the ideas or images it conveys are offensive." Clay Calvert, *The 'Enticing Images' Doctrine: An Emerging Principle in First Amendment Jurisprudence?*, 10 FORDHAM I.P., MEDIA & ENT. L.J. 595, 606 (2000).

The Seventh Circuit, in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986), well encapsulated the threat to freedom of speech posed by laws like the CPPA that attempt to control the thoughts of readers or listeners: "[A]lmost all cultural stimuli provoke unconscious responses . . . If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech." 771 F.2d at 330.

Attempting to regulate speech based on its effect espouses the long-rejected 1868 holding of *Regina v. Hicklin*, L.R. 3 Q.B. 368 (1868). *Hicklin* set forth the early leading standard of obscenity, which allowed material to be judged based on the effect of isolated excerpts upon particularly susceptible persons. In *Roth v. United States*, 354 U.S. 476, 489 (1957), the Court expressly rejected the *Hicklin* test on the ground that because it "might well encompass material legitimately treating with sex . . . it must be rejected as unconstitutionally restrictive of the freedoms of speech and press."

None of the traditional categories of unprotected speech embraces the creative works proscribed by the CPPA. *See R.A.V.*, 505 U.S. at 382-83 (content-based restrictions permitted in a "few limited areas" such as obscenity, defamation, and fighting words). Of particular relevance here, this Court has repeatedly held that, unless speech *incites immediate and direct harm*, it is not subject to government regulation simply because it is has undesirable effects on the thoughts of listeners, or because it has the effect of offending others in the community. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (advocacy of violence protected by First Amendment except where directed to inciting or producing imminent lawless action and likely to incite or produce such action); *Playboy*, 529 U.S. at 813 ("Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists."); *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (ban on flag burning not permitted based on its "potential for a breach of the peace"); *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (provocative remarks by a demonstrator to police could not be punished on the ground

that they had a mere tendency to lead to violence); *Stanley*, 394 U.S. at 565 (government's concern with the effect of obscenity on the minds of viewers not a permissible reason for banning private possession of obscenity); *Hudnut*, 771 F.2d at 333 (claim that pornography causes men to view women as objects and discriminate against women cannot justify prohibition on pornography that portrayed women in degrading manner); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987) (magazine's detailed description of autoerotic asphyxia, which teenager followed in making fatal attempt to perform the act, protected by First Amendment because it did not "incite" the teenager to harm himself); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Cal. App. 1988) (dismissing on First Amendment grounds claim that record "Suicide Solution" intentionally incited suicide of listener).[5]

There can be no doubt that virtual child pornography "is neither sufficiently imminent nor impelling to constitute incitement." Burke, *The Criminalization of Virtual Child Pornography*, *supra*, at 461. Indeed, it is inconceivable that mere images, as opposed to spoken words, could ever constitute incitement. That is because, as the court of appeals noted, "the unhappy effects of pornography depend on mental intermediation." *Free Speech Coalition*, 198 F.3d at 1093. This intermediation, however deviant it may be, removes virtual child pornography from the realm of speech that may be banned consonant with core values embedded in our First Amendment jurisprudence.

5. Denying First Amendment protection to so-called "fighting words" is likewise premised on the immediate harm caused by their utterance. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (First Amendment does not protect "fighting words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

Those values were well articulated in *Herceg*, where the court expressed our constitutional commitment to protecting even harmful speech in the interest of permitting freedom of thought to flourish:

> The constitutional protection accorded to the freedom of speech and of the press is not based on the naïve belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.

814 F.2d at 1019.

Because the CPPA cannot be reconciled with these fundamental First Amendment principles, the court of appeals properly struck it down.

3. Facilitating enforcement of existing child pornography laws is not a compelling government interest

The government also claims that "because computers can produce images that are virtually indistinguishable from images of real children, a defendant charged with distributing or possessing images of real children could almost always argue that the government failed to prove beyond a reasonable doubt that the images were of real children." Pet. Br. at 23; S. Rep. No. 104-358, at 20. The government has offered only a few examples of defendants raising such a defense, and none of them was acquitted. *See* Pet. Br. at 37 n.8; S. Rep. No. 104-358, at 17. This evidence falls far short of demonstrating a compelling interest in regulating protected speech.

Moreover, a prohibition of protected speech may not be justified on the ground that the prohibition "eases the administration of otherwise valid criminal laws." *Stanley*, 394 U.S. at 568 (citing *Smith v. California*, 361 U.S. 147 (1959)). The First Amendment does not permit the creation of a new category of unprotected speech in order to ease the task of law enforcement authorities in policing a category of speech already found to be unprotected.

C. If Upheld, the CPPA Could Lead to More Governmental Regulation of Protected Speech on the Basis of Its Perceived Harmful Effects

The potential implications of endorsing the government's justifications for the CPPA are far-reaching and extremely troublesome. If non-obscene sexually explicit images, the creation of which did not involve actual children, can be banned based on their purported effect on certain viewers, then the government could, in theory, regulate any category of speech that could be asserted to have some undesirable effect on certain recipients. As one commentator noted:

> If one class of speech can be said to somehow entice children into illegal conduct, then surely Congress will continue to expand the definition of child pornography, sweeping up and regulating more and more forms of previously protected speech that allegedly influence children.

Calvert, *The 'Enticing Images' Doctrine*, *supra*, at 607.

Beyond the context of child pornography, we have already begun to see legislative efforts to eradicate speech

instance, studies purporting to find that depictions of violence may cause young viewers to react aggressively or violently are increasingly being cited to justify restrictions on violent imagery, musical lyrics, and even written descriptions. Indeed, a measure was introduced into the House of Representatives in June 1999 that would have made it a crime to expose children to images, sound recordings, or printed descriptions of graphic violence. *See* H.R. 2036, 106th Cong. (1999). Measures presently pending before Congress seek to ban the broadcasting of certain violent video programming during hours that children are likely to be in the viewing audience based on Congress' belief that "violent video programming influences children, as does indecent programming." *See, e.g.*, H.R. 1005, 107th Cong. (2001). Yet another bill would make marketing "adult-rated" movies, video games, and music to minors illegal as a "deceptive" trade practice. The bill is based on lawmakers' assertion that "media violence can be harmful to children." *See* S. 792, 107th Cong. (2001).

In addition to these Congressional attempts to impose unprecedented regulations on speech, a number of laws have been passed at the state and local level attempting to regulate violent imagery in the interest of protecting minors. *See, e.g.*, *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (preliminarily enjoining enforcement of Indianapolis ordinance barring access of minors unaccompanied by parent to video game machines containing "graphic violence" and deemed to be harmful to minors); *Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63, 64 (2d Cir. 1997) (finding unconstitutional local ordinance barring distribution to minors of trading cards depicting heinous crimes or criminals that legislators considered a contributing factor to juvenile crime); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992) (striking down state statute banning rental or sale of violent video cassettes to minors).

These legislative efforts, which are predicated on the theory that the rationale for regulating sexual material applies equally to violent material, highlight the enormous potential ramifications of this case for mainstream speech that is vulnerable to claims that it leads some to engage in aberrant behavior. *Amici* believe that these efforts, however well-intentioned, are ill-advised not only because they lack factual support but, more importantly, because they cannot be reconciled with the free marketplace of ideas guaranteed by the First Amendment.

* * *

New concerns associated with the advent of new technologies cannot serve as justification for whittling away at fundamental freedoms of speech. *See generally ACLU*, 521 U.S. 844 (striking down statute prohibiting transmission of "indecent" or "patently offensive" communications to minors over the Internet). "As technology presents greater challenges to the preservation of fundamental freedoms, opening the door to the punishment of virtual crimes, based upon a fear that actual crimes will occur, or that society as a whole will degenerate, is frightful." Burke, *The Criminalization of Virtual Child Pornography*, *supra*, at 468.

State and federal governments have an array of laws in their arsenals to fight the sexual abuse of children, including existing child pornography laws and statutes that criminalize sexual contact with children. Seduction or molestation of children should be vigorously prosecuted, but not by means of a statute that imposes an outright ban on artistic works that may be used by perpetrators of the crime. "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not

abridgment of the rights of free speech." *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York*, 360 U.S. 684, 689 (1959) (citing *Whitney v. California*, 274 U.S. 357, 376 (1927)).

II. THE CPPA IS OVERBROAD

The court of appeals also found the CPPA unconstitutionally overbroad because, on its face, it prohibits non-obscene sexual material that does not involve actual children and therefore is protected by the First Amendment. *Free Speech Coalition*, 198 F.3d at 1096. Because, as discussed above, the government has no compelling interest in banning images that were not created with and that do not depict actual children, the court of appeals' finding of overbreadth should be sustained.

The CPPA would forbid the distribution of material with "serious literary, scientific, or educational value or material which does not threaten the harms sought to be combated by the State." *Ferber*, 458 U.S. at 766. Unlike *Ferber*, where the Court held that the use of minors in sexually explicit educational, medical or artistic works would amount to "no more than a tiny fraction of the materials within the statute's reach," 458 U.S. at 773, the sweeping language of the CPPA, which criminalizes any visual depiction that "appears to be" of a minor engaged in sexually-explicit conduct, or that is advertised or promoted to "convey the impression" that a minor is engaged in sexual conduct, would apply to a wide range of creative, artistic, and educational visual depictions. The statute's reach is not limited to a few works existing at the "edges" of the statute that can be accommodated through case-by-case evaluation. *See United States v. Hilton*, 167 F.3d 61, 74 (1st Cir.), *cert. denied*, 528 U.S. 844 (1999) (upholding CPPA).

The amount of mainstream speech that is potentially subject to prosecution under, and therefore will be chilled by, the CPPA is substantial.[6] One example of the chilling effect of the CPPA on mainstream works of art occurred in 1997, when U.S. film distributors became reluctant to release *Lolita*, the second film version of Vladimir Nabokov's classic novel. The film's more explicit sexual scenes involving the title character were played by an adult-body double, but distributors apparently feared prosecution under the CPPA because those scenes "appear[ed] to be" of a minor engaged in sexual conduct and, by the very nature of *Lolita's* storyline, were presented to "convey the impression" that a minor was engaging in sex. *See* "Fallout from Child Pornography Act: 'Kiddie porn' Law Has Apparently Scared Off Potential Distributors," San Francisco Chronicle, Aug. 3, 1997, at 4/Z5.

The CPPA also arguably covers the recent critically acclaimed film *Traffic*, for which Steven Soderbergh won the Academy Award for best director. *Traffic* contains a scene, intended to illustrate the dangers to teenagers of drug addiction, in which a 16 year-old girl (played by a 17 year-old actress) is shown in bed from the shoulders up in a manner that makes clear that she is having intercourse. This depiction, while unquestionably having serious artistic value, could be considered subject to the strictures of the CPPA notwithstanding the fact that it does not actually show

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6. The risk to *amici* is particularly great in light of the fact that the CPPA's definition of potential works constituting child pornography does not require that the work be taken as a whole and includes "lascivious exhibition of the genitals" which, under *United States v. Knox*, 32 F.3d 733 (3d Cir. 1994), includes depictions in which there is no nudity and the genitalia are clothed.

sexual conduct because it "appears to be of a minor engaging in sexually explicit conduct" which is defined as "actual or simulated . . . sexual intercourse." 18 U.S.C. § 2256(2)(A).

In attempting to convince the Court that, despite the plain language of the statute, the CPPA does not reach works of significant value, the government contends that "[t]o the extent that it might be necessary for literary, scientific, or educational purposes to depict children engaging in such conduct, the depictions can be created in a manner that is consistent with the CPPA." Pet. Br. at 24-25. Thus, the government argues, the use of "drawings, cartoons, sculptures, or paintings that depict youthful-looking persons in sexual poses" are not prohibited. *Id.* at 25. The government also claims that the CPPA "is aimed at hard core child pornography" and does not apply to "visual materials in which sexually explicit conduct by children is understood to be taking place, as long as the sexually explicit conduct is not itself visually depicted." *Id.* at 17, 25.

However, that Congress may have *intended* to criminalize only computer-generated images that are "virtually indistinguishable" from traditional child pornography provides no comfort to those whose artistic creations nevertheless arguably fall within the CPPA's broad language. The confiscation of copies of the Academy Award-winning motion picture *The Tin Drum* by the Oklahoma City Police Department in June 1997 pursuant to an *ex parte* ruling that the film contained child pornography in violation of Oklahoma law vividly illustrates the dangers of a speech restriction as broadly worded as the CPPA. *See Camfield v. Oklahoma City*, 248 F.3d 1214 (10th Cir. 2001); *Video Software Dealers Ass'n v. Oklahoma City*, 6 F. Supp. 2d 1292 (W.D. Okla. 1997); *Oklahoma v. Blockbuster Videos, Inc.*, No. Civ. 97-1281-T, 1998 WL 1108158, 27 Media L. Rep. 1248 (W.D. Okla. Oct. 20, 1998).

It is notable that *The Tin Drum* was confiscated as child pornography despite the absence of any display of the genital area in any of the three brief scenes in question *and* despite a statutory exception for "bona fide objects of art or artistic pursuits" (an exception absent from the CPPA). *Blockbuster Videos*, 1998 WL 1108158, at *3. The *Tin Drum* episode underscores the extent to which the government's assurance that only "hard core" virtual child pornography will be prosecuted under the CPPA is insufficient to protect the First Amendment interests of the creators and distributors of mainstream works that contain even non-explicit sexual content involving minors or actors portraying minors.

The Court should not uphold the Act based on a limiting construction that is at odds with the plain language of the statute. Like the statute struck down in *ACLU*, "[t]he open-ended character of the [CPPA] provides no guidance what[so]ever for limiting its coverage." 521 U.S. 884. The Court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Id.* In *ACLU*, the Court reiterated its belief that

> [i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.

Id. at 884 n.49.

Even more problematic is the implication of the government's argument that artistic or socially valuable

portrayals of minors engaged in sex must not be realistic in order to avoid prosecution under the statute. For the government to approve certain pictorial forms while criminalizing others amounts to impermissible censorship and governmental meddling in the artistic process.

Because a vast amount of protected speech arguably falls within the CPPA's reach, it is unconstitutionally overbroad.

III. THE CPPA IS IMPERMISSIBLY VAGUE

The pre-CPPA definition of child pornography was not unconstitutionally vague because it incorporated the objective requirement that actual children be photographed or depicted. The same cannot be said of the CPPA. The operative "appears to be" and "conveys the impression" language of the CPPA renders the statute void for vagueness because it fails to adequately constrain the discretion of police and prosecutors to criminalize works that they may subjectively find distasteful or offensive.

A statute is void for vagueness if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The primary purpose of the vagueness doctrine is to ensure that legislatures establish guidelines to govern law enforcement so that a criminal statute does not "permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " *Id.* at 358 (citing *Smith v. Goguen*, 415 U.S. 566, 574-575 (1974)).

Where a statute imposes criminal penalties, "the standard of certainty is higher" than it is for civil statutes. *Kolender*, 461 U.S. at 358 n.8. That is so because the concern that "uncertain meanings" inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked," *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)), is particularly acute where the cost of guessing wrong could be a severe criminal penalty. *See ACLU*, 521 U.S. at 872 ("The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."). Vagueness concerns are also heightened in the context of restrictions on speech. *See Smith v. California*, 361 U.S. 147, 151 (1959) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.").

These concerns are fully implicated here. As the court of appeals found, the "appears to be" and "conveys the impression" standards are largely subjective, relating to the reaction of any single viewer rather than to any concept or character inherent in the depiction itself. *See Free Speech Coalition*, 198 F.3d at 1095; *ACLU*, 521 U.S. at 873-74 (statute prohibiting "patently offensive" or "indecent" communications to minors on the Internet unconstitutionally vague where it provided no limitations on what could be considered offensive or indecent).[7] As a result, the Act does

7. *See also Kolender*, 461 U.S. at 358 (statute's requirement that loitering individuals provide "credible and reliable" identification was unconstitutionally vague because it "vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute").

not provide a person with sufficient guidance in determining whether the material he or she may be dealing with falls within the statute's ambit. The difficulty of distinguishing a person just under the age of minority from a young adult based solely on his or her appearance underscores the problem of hinging criminal liability on such an uncertain distinction. And the severity of the criminal penalties that can be imposed for speech found to violate the CPPA increases the fear of chilling protected speech. *See* 18 U.S.C. § 2252A(b) (providing maximum penalty of thirty years imprisonment for violation of CPPA).

Contrary to the government's claim (Pet. Br. at 27-28), it is impossible to determine objectively what material is criminalized by the CPPA because what "appears to be" a minor to one person may not seem so to another. As such, the CPPA "presents a greater threat of censoring speech that, in fact, falls outside the statute's scope." *ACLU*, 521 U.S. at 874. It is conceivable that a person may be criminally charged if it happens to appear to an official vested with the power to enforce the CPPA that sexually explicit material depicts a minor or is being marketed in a manner that "conveys [that] impression." For a publisher, video store, or newsstand owner, the opprobrium of being labeled a "child pornographer" based on the subjective beliefs of law enforcement officials poses a threat that will lead to self-censorship. The First Amendment does not tolerate such imprecision.

IV. THE CPPA'S AFFIRMATIVE DEFENSE DOES NOT RENDER IT CONSTITUTIONAL

The government also relies on the CPPA's affirmative defense in arguing that the statute is constitutional. *See, e.g.*, Pet. Br. at 25. The defense is available to defendants who can establish that the alleged child pornography was produced using an actual person who was an adult at the time the material was produced, and that the defendant did not advertise, promote, present, describe, or distribute the material in a manner that conveys the impression that it contains a depiction of a minor engaging in sexually explicit conduct. 18 U.S.C. § 2252A(c).

Contrary to the government's argument, the CPPA's affirmative defense would provide little or no relief to the creators and distributors of artistic works. First, due to the requirement that the defendant prove that an "actual" person was used in the material, the defense would not apply to any illustrations, paintings, cartoons, or computer-generated works. .

Second, the affirmative defense would not apply to works, such as a motion picture version of *Lolita*, that are created using an adult portraying a minor with the intention that the adult actually look like a minor engaged in sexual conduct or sexual poses. (As previously noted, the CPPA's prohibition on the use of adults to portray minors in artistic works runs afoul of the Court's acknowledgement in *Ferber* that such depictions could not be constitutionally banned.)

Third, under *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), a librarian, retailer, or distributor is not liable under child pornography statutes unless he or she knew

that the material loaned, sold or distributed contained sexually explicit depictions of an actual minor. Under *X-Citement*, the burden is on the government to prove such knowledge. The CPPA's affirmative defense impermissibly shifts this burden to the defendant to prove instead that the depiction is of an actual adult.

Finally, for mainstream businesses, such as those represented by *amici*, even to be charged with distribution of child pornography is often tantamount to a death sentence. The right to assert an affirmative defense offers no relief from the stigma that would undoubtedly attach to a business publicly charged with violating the CPPA. Thus, the potential chilling effect of the CPPA on such mainstream businesses is substantial.

CONCLUSION

For the aforementioned reasons, *amici* urge the Court to affirm the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — THE *AMICI*

The Association of American Publishers, Inc. (AAP) is the national association in the United States of publishers of general books, textbooks and educational materials. The AAP's approximately 300 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States.

The American Booksellers Foundation for Free Expression (ABFFE) was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Freedom To Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen; to support the right of libraries to include in their collections and make available to the public any work they may legally acquire; and to establish legal precedent for the freedom to read on behalf of all citizens.

The International Periodical Distributors Association is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

Appendix A

Magazine Publishers of America (MPA) is a national trade association including in its present membership more than 240 domestic magazine publishers who publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people.

The Publishers Marketing Association (PMA) is a nonprofit trade association representing more than 2,000 publishers across the United States and Canada. PMA represents predominantly nonfiction publishers and assists members in their marketing efforts to the trade.

The Video Software Dealers Association is the trade association for the home video entertainment industry. It represents more than 3,500 member-companies in North America and 22 countries worldwide, including small, independently owned video retailers as well as large video chains. It also includes the home video divisions of all the major and independent motion picture studios, and the other associated businesses that comprise the home video industry.